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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 578

FIRST NATIONAL REALTY CORPORATION,

Petitioner,

v.

ETHEL JAVINS
RUDOLPH SAUNDERS
STANLEY GROSS

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Herman Miller
400 - 5th Street, N.W.
Washington, D.C. 20001
628 - 0059

Attorney for Petitioner

Washington, D. C. ETHEL PRESS 202 393 0625

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner, First National Realty Corporation, by its attorney, Herman Miller, presents this petition for a writ of certiorari.

REPORT OF OPINIONS BELOW

The District of Columbia Court of General Sessions in its L&T Nos. 28,968-66, 28,975-66 and 28,988-66 entered judgment in favor of the petitioner for possession, on an instructed verdict to the jury but did not hand down an opinion.

The respondents appealed to the District of Columbia Court of Appeals which affirmed, 245 A.2d 836, that opinion is attached hereto.

The respondents thereafter applied to the United States Court of Appeals for the District of Columbia Circuit, which Court allowed the appeal, and upon hearing of the appeal, that Court reversed the District of Columbia Court of Appeals. Said opinion has not yet been published in any official or unofficial report. That opinion is also attached hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The petitioner seeks to have reviewed the judgment of the United States Court of Appeals for the District of Columbia Circuit dated May 7th, 1970, reversing the judgment of the District of Columbia Court of Appeals. The petition for rehearing en banc was denied. Said petition and order are included in the certified transcript of the record filed herewith.

The judgment sought to be reviewed is dated May 7th, 1970, and by order of Mr. Justice Brennan the time for filing this petition was extended to August 21st, 1970, such extension was granted on August 6th, 1970. The review is sought on a matter of very special and very important reason, by reason of the fact that the common law which has been followed from the time of the founding of our

country and upon which cases throughout the country have been heretofore decided have now been overturned. The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict and overturns all the decisions of all other courts of appeals including that of the District of Columbia and has decided an extremely important question in a way which now is in conflict with the applicable laws of the District of Columbia and has now created such a confusion, ambiguity and uncertainty which amounts to violation of due process. The manner in which the law is now left requires settlement by this Court and by the decision of the District of Columbia Circuit has resulted in such a far departure from the accepted and usual course of judicial proceedings, which has never heretofore been declared. That such decision calls for an exercise by this Court of its powers of supervision to avoid the duplicity, uncertainty and doubts cast upon titles, not only in the District of Columbia, but which may reflect upon procedures and titles in the States.

STATUTORY PROVISION CONFERRING JURISDICTION

The statutory provision conferring on this Honorable Court jurisdiction to review the judgments of the United States Court of Appeals for the District of Columbia Circuit is 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The points relied upon by the petitioner for granting the writ are as follows:

POINT ONE

It is the Statutory recognition of the estates in land is now overturned and no longer exists but become, as

declared in the Circuit Court's opinion purely contractual matters?

POINT TWO

Is there any difference between what the Circuit Court called a contract which is controlled by the fact that it isn't a high rise apartment and that dealing with urban property involving single homes in which there are front and back yards?

POINT THREE

Does the reasoning of the Circuit Court apply only to residential property, but a different theory applies to commercial leases involving large office buildings?

CONSTITUTIONAL PROVISIONS, STATUTES

Fifth amendment, U.S. Constitution:

> "No person shall be deprived of property without due process of law."

D.C. Code, Title 45, Section 801 – Estates in Land:

> "Estates in land in the District shall be estates of inheritance, estates for life, estates for years, estates at will and estates by sufferance."

D.C. Code, Title 45, Section 106 – Creation of Term in Excess of One Year to be by Deed or Will.

> "No estate of inheritance, or for life or for a longer term than one year, in any real property, copereal or incoporeal, in the District of Columbia, or any declaration or limitation of uses in the same, for any of the estates mentioned, shall be created to take effect except by deed signed and sealed by the grantor, lessor or declaret or by will."

D.C. Code, Title 818 – Estates for Years:

> "An estate for a determined period of time is an estate for years."

D.C. Code, Title 45 - 820, Estates by Sufferance:

> "All estates which by construction of the Courts were estates from year to year, at common law, as where a tenant goes into possession and pays rent without an agreement for a term, or where a tenant for years, after the expiration of his term, continues in possession and pays rent and the like and all verbal hirings by the month, or at any specified rate per month shall be deemed estates by sufferance."

D.C. Code, Title 45 - 822, Estates at Will-When Terminated:

> "An estate at will is one held by the joint will of the lessor and lessee, and which may be terminated at any time, as herein elsewhere provided by either party; such estate shall not exist or be created except by express contract; provided, however, that in case of a sale of real estate under mortgage or by deed of trust or execution or a conveyance thereof to the purchaser, the grantor in such a mortgage or deed of trust, execution defendant, or those in possession claiming under him, shall be held and construed to be tenants at will, except in case where a tenant holding over after unexpired lease for years, in writing, antidating the mortgage or deed of trust."

D.C. Code, Title 45 - 901, When notice to quit is not necessary:

> "When real estate is leased for a certain term no notice to quit shall be necessary, but the landlord shall be entitled to possession without such notice immediately upon the expiration of the term."

D.C. Code, Title 45 - 902, Notices to quit - month to month:

> "A tenancy from month to month, or from quarter to quarter may be terminated by thirty days notice in writing from the landlord to the tenant to quit and vacate, or by such a notice from the tenant to the landlord of his intention to quit, said notice to expire; in either case, on the day of the month from which such tenancy commenced to run."

D.C. Code, Title 45 – 904, Tenancies by sufferance – when terminated:

> "A tenancy by sufferance may be terminated at any time by a notice in writing from the landlord to the tenant to quit the premises leased, or by such notice from the tenant to the landlord of his intention to quit on the thirtieth day after the day of service of the notice. * * *"

D.C. Code, Title 45 – 915, Landlord's liens for rent:

> "The landlord shall have attached a lien for his rent upon such of the tenant's personal chattels on the premises, as are subject to execution for debt, to commence with the tenancy and to continue for three months after the rent is due and until the termination of any action for such rent brought within said three month period."

STATEMENT OF THE CASE

The petitioner, the owner of the complex in the District of Columbia formerly known as Clifton Terrace, rented three apartments to the respondents respectively, as private residences, under written monthly tenancy agreements. Each of the tenants were sued in separate landlord and tenant action for possession. At that time, by reason of a decision of the District of Columbia Court of Appeals, *Brown v. Southall*, D.C. App. 237 A.2d, 834 (1966). That Court declared where housing violations existed at the commencement of the tenancy the lease or rental agreement between the parties was void. Alleging in their answer that that condition existed at the time of the commencement of their tenancy, when the case came to trial the respondents admitted that they were unable to prove or offer any evidence of any housing violations at the inception of the tenancy and thereupon the trial judge directed a verdict against the respondents.

On appeal to the District of Columbia Court of Appeals, the judgment was affirmed and thereafter the United States

Court of Appeals for the District of Columbia Circuit reversed. Application for rehearing en banc was denied.

STATEMENT FOR FEDERAL JURISDICTION OF FIRST INSTANCE

D.C. Code, Title 11 - 321 (1967)

ARGUMENT

A decision as was adopted by the United States Court of Appeals abolishes all the concepts of tenancies in urban areas involving high rise apartments and declared the relationship between the owner and the occupant to be that of a contract rather than the concept of the tenancy and in so doing because the relationship housing accomodations create a new theory of law not adopted by Congress creating a new principle of continuing implied warranty of the fitness of the premises. The opinion of the District of Columbia Court of Appeals sets forth the long established principle law existing between the landlords and tenants which has come down from colonial days, in its' decision the circuit court attempted to draw an analogy between housing accomodations and the Uniform Commercial Code, which, by legislative procedures adopted the principle of implied warranty. That Statute applying to new personal property has been now attempted to be stretched to include used real estate and the circuit court went to great lengths to draw this analogy. But what is the answer in a sale involving personalty, for instance an automobile which meets perfectly the features of the requirements of the implied warranty at the time of sale? Does it mean that if the car has gone 80,000 miles and the transmission wears out that the dealer is required under a continuing implied warranty to renew the transmission? This is what the circuit court tried to do about real estate, this decision has now created untold hardship against persons owning real estate. A mere assertion by a tenant who fails to pay his rent that the premises are not in good condition has now caused an avalanche of cases in the District of Columbia Court of Appeals in

which tenants by this mere unsupported statement are able to avoid payment of rent of anywhere from several months to over several years and in one case has avoided making payment of rent for over twenty-five months. The circuit court now has declared, by reasoning that in urban high rise apartments, rental agreements and relationship of tenancies no longer exist, that the matter is one of contract. If this is correct, are all the above cited Code provisions dealing with the kinds of estates abolished? If a contract now exists, are all the Statutory provisions regarding the notice and the termination of agreements likewise abolished?

POINT ONE

The Circuit Court's decision now has impaired the right to contract, when on page 21 it is held that "any private agreement to shift the duties would be illegal and unenforcable." This destroys all present provisions of contracts heretofore made, where the tenant has assumed the obligations of compliance with the Housing Regulations. It now bars a case where an owner is unwilling or is unable to make such repairs to meet compliance, and where, for a valuable consideration, he seeks to contract with a contractor or even the tenant, for reduced rent, or no rent for a given period, may not contract for the lessee to make the repairs. Practically all commercial leases make provision for the tenant to make repairs. Is there a different standard for residential leases than for commercial leases? The foot note citation in the opinion is not applicable. That citation attempts to make an agreement for a waiver. In our example, no waiver is attempted but an agreement is attempted between the parties to re-establish the habitability of the premises to put it in conformance. This is the main purpose of the housing requirements. How this is accomplished is no concern to the Inspectors. The obligation is placed on the owner by the regulations to cover situations where the property is occupied and no one attempts to make compliance. The decision seems to be dis-

criminatory. It permits the tenant to contract to make the repairs in suburban and commercial leases but it bars that contractual right in high rise tenancies, with some doubt as to urban single family tenancies.

POINT TWO

The circuit courts opinion leaves the law presently so unsettled as to make it doubtful as to when it does and does not apply. The entire reasoning of the circuit courts opinion applied to high rise apartments, reasoning that a person who resides on the tenth floor has no interest in the land and made the distinction between urban and suburban leases. But what becomes of the urban properties in which single family dwellings with front and rear yards are rented? The use of the land is important and in many instances, the occupant uses part of the land for either vegetable or flower gardens. Is there one set of laws dealing with high rise residences and another dealing with single family dwellings with plots of land? In those instances where the occupant resides on the ground floor, is his occupancy to be considered a lease and those above him to be considered contract occupants?

POINT THREE

The entire reasoning of the circuit courts opinion dealt with continuing implied warranties as to residence properties. But, what law would apply to a high rise office building which does not involve housing accomodations? Is the existing law to remain as it has been for hundreds of years involving this type of property? Since the Housing Regulations do not apply to commercially rented properties, do we presently have by judicial fiat, varying laws dealing with different properties? At what point does the property cause to be urban and is suburban? In the environs of every city is suburban property and yet it is very close to a metropolitan area to be considered urban rather than suburban, is not the law so mixed up, so ambiguous, so uncertain as to what property that the condition now presented really violates due process?

CONSIDERATION OF CHANGE OF THE LONG STANDING COMMON LAW AS REFLECTED BY CONTINUOUS DECISIONS BY JUDICIAL LEGISLATION AND NOT BY CONGRESSIONAL ACTION

The Circuit Court's opinion clearly recognizes that it is sweeping away the common law which has been in existence since colonial times, and which has been recognized by all decisions since such early times. Bu this decision, it now has been determined by judicial legislation such long standing principles of law are no longer in effect which, of course, has not been accomplished by Congressional action. In a case before this Court, *Fisher v. U.S.* decided June 10th, 1946 arising out of the District of Columbia affirming 80 U.S. App. D.C. 96, 149 F.2d 28, while that case involved a criminal proceeding, the same considerations are involved; this Court recognized that common law of long standing should not be distrubed except by Congressional legislation. The issue was consideration of the elements of first degree murder, and some of the language of that decision is as follows:

> "Congress took a forward step in defining the degrees of murder so that only those guilty of deliberate and premediated malice could be convicted of the first degree. It may be that psychiatry and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. *For this Court to force the District of Columbia to adopt a requirement for criminal trials would invoke a fundamental change in the common law theory of responsibility. (Italic supplied)* We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. *Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power* or at least for the discretion of the courts of the District. (further *Italic supplied)*

******* The policy of deferring to the District courts on local matters is reinforced here by the fact that local law now challenged is long established and deeply rooted in the District"

In a dissenting opinion by Mr. Justice Murphy, he used the following language:

"The rule of this Court ordinarily will refrain from reviewing decisions dealing with local law in the District of Columbia is a sound and necessary one. But, it is not to be applied without discretion. Like most rules this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and of sound administration of justice.

In the past, this Court has seen fit to determine various common law issues affecting only the District of Columbia. It has also, on occasion, settled issues involving the interpretation of provisions of the District of Columbia Code."

PRAYER

WHEREFORE, the petitioner prays that it may be granted a writ of certiorari and that this Honorable Court consider the certified transcript of record filed and on hearing the judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed, and the petitioner prays for such other and further relief as may be meet and proper.

Respectfully submitted,

Herman Miller
400 - 5th Street, N.W.,
Washington, D.C. 20001
628-0059

Attorney for Petitioner

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,405

ETHEL JAVINS, APPELLANT

v.

FIRST NATIONAL REALTY CORPORATION, APPELLEE

No. 22,406

RUDOLPH SAUNDERS, APPELLANT

v.

FIRST NATIONAL REALTY CORPORATION, APPELLEE

No. 22,409

STANLEY GROSS, APPELLANT

v.

FIRST NATIONAL REALTY CORPORATION, APPELLEE

Appeals from the District of Columbia
Court of Appeals

Decided May 7, 1970

Mr. Edmund E. Fleming for appellants.

Mr. Herman Miller for appellee.

Mr. Caryl S. Terry filed a brief on behalf of Washington Planning and Housing Association as *amicus curiae* urging reversal.

Mrs. Margaret F. Ewing, Mrs. Florence Wagman Roisman and *Mrs. Patricia M. Wald* filed a brief on behalf of Neighborhood Legal Services Program as *amicus curiae* urging reversal.

Messrs. Myron Moskovitz and *Peter Honigsberg* filed a brief on behalf of National Housing Law Project as *amicus curiae* urging reversal.

Before WRIGHT, MCGOWAN and ROBB, *Circuit Judges*.

WRIGHT, *Circuit Judge*: These cases present the question whether housing code[1] violations which arise during the term of a lease have any effect upon the tenant's obligation to pay rent. The Landlord and Tenant Branch of the District of Columbia Court of General Sessions ruled proof of such violations inadmissible when proffered as a defense to an eviction action for nonpayment of rent. The District of Columbia Court of Appeals upheld this ruling. *Saunders v. First National Realty Corp.*, 245 A.2d 836 (1968).

Because of the importance of the question presented, we granted appellants' petitions for leave to appeal. We now reverse and hold that a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations

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[1] HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA (1956).

and that breach of this warranty gives rise to the usual remedies for breach of contract.

I

The facts revealed by the record are simple. By separate written leases,[2] each of the appellants rented an apartment in a three-building apartment complex in Northwest Washington known as Clifton Terrace. The landlord, First National Realty Corporation, filed separate actions in the Landlord and Tenant Branch of the Court of General Sessions on April 8, 1966, seeking possession on the ground that each of the appellants had defaulted in the payment of rent due for the month of April. The tenants, appellants here, admitted that they had not paid the landlord any rent for April. However, they alleged numerous violations of the Housing Regulations as "an equitable defense or [a] claim by way of recoupment or set-off in an amount equal to the rent claim," as provided in the rules of the Court of Generals Sessions.[3] They offered to prove

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[2] A clause in the lease provided that the tenant waived the statutory 30-day notice to quit. 45 D. C. CODE § 908 (1967) expressly permits waiver of this notice. Appellants' answer put in issue the validity of the waivers. In view of our disposition, we have no occasion to pass upon this aspect of the case.

[3] Rule 4 (c) of the Landlord and Tenant Branch of the Court of General Sessions provides:

> "In suits in this branch for recovery of possession of property in which the basis of recovery of possession is nonpayment of rent, tenants may set up an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim. No counterclaim may be filed unless plaintiff asks for money judgment for rent. The exclusion of prosecution of any claims in this branch shall be without prejudice to the prosecution of any claims in other branches of the court."

Appellants have sought only to defeat the landlord's action;

> "[t]hat there are approximately 1500 violations of the Housing Regulations of the District of Columbia in the building at Clifton Terrace, where Defendant resides some affecting the premises of this Defendant directly, others indirectly, and all tending to establish a course of conduct of violation of the Housing Regulations to the damage of Defendants * * *."

Settled Statement of Proceedings and Evidence, p. 2 (1966). Appellants conceded at trial, however, that this offer of proof reached only violations which had arisen since the term of the lease had commenced. The Court of General Sessions refused appellants' offer of proof[4] and entered judgment for the landlord. The District of Columbia Court of Appeals affirmed, rejecting the argument made by appellants that the landlord was under a contractual duty to maintain the premises in compliance with the Housing Regulations. *Saunders* v. *First National Realty Corp.*, *supra*, 245 A.2d at 838.[5]

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they have not as yet claimed any money damages for the landlord's alleged breach of contract. Under Rule 4(c) *supra*, they may not counterclaim for money damages if the landlord seeks only possession and no money judgment, as it has done here. For the considerations to be applied in determining whether this rule conforms "as nearly as may be practicable" to the Federal Rules of Civil Procedure as required by 13 D. C. CODE § 101 (1967), *see McKelton* v. *Bruno*, —— U.S.App.D.C. ——, —— F.2d —— (No. 22,628, decided February 17, 1970).

[4] According to established procedure, this case was submitted to both the District of Columbia Court of Appeals and this court on the basis of a sparse "Settled Statement of Proceedings and Evidence," as approved by both parties and the trial judge. Unfortunately, the court's ruling on the offer of proof was made from the bench, and the basis of the ruling is not reflected in the "Settled Statement." We have recently noted the inadequacy of such records for review by an appellate court. *Lee* v. *Habib*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 22,203-4, decided January 22, 1970).

[5] In the District of Columbia Court of Appeals, appellee

II

Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases. However, as the Supreme Court has noted in another context, "the body of private property law * * *, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." [6] Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed.[7] As we have said before, "[T]he continued vitality of the common law * * * depends upon its ability to reflect contemporary community values and ethics." [8]

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rur-

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urged that these cases were moot on the basis of events occurring since the landlord initiated this litigation. The D. C. Court of Appeals held that the cases were not moot. *Saunders* v. *First National Realty Co.*, 245 A.2d 836, 837 (1968). Appellee has not argued mootness here, and in any event we follow the ruling of the D. C. Court of Appeals on this point.

[6] *Jones* v. *United States*, 362 U.S. 257, 266 (1960).

[7] *See Spencer* v. *General Hospital of the District of Columbia*, —— U.S.App.D.C. ——, —— F.2d —— (No. 21,493, decided November 10, 1969) (*en banc*) (slip opinion at 8); *Schipper* v. *Levitt & Sons, Inc.*, 44 N.J. 70, ——, 207 A.2d 314, 325 (1965). *Cf.* 11 S. WILLISTON, CONTRACTS § 1393A at 461 (3d ed. W. Jaeger 1968) ("Most of the leading jurisdictions have not hesitated to undo a judicially committed blunder * * * by employing the same means—judicial decisions") and cases cited therein at n. 20.

[8] *Whetzel* v. *Jess Fisher Management Co.*, 108 U.S.App.D.C. 385, 388, 282 F.2d 943, 946 (1960).

al, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services[9]—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Professor Powell summarizes the present state of the law:

> "* * * The complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses inserted in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient. In practice, the law today concerning estates for years consists chiefly of rules determining the construction and effect of lease covenants. * * *"[10]

Ironically, however, the rules governing the construction and interpretation of "predominantly contractual" obligations in leases have too often remained rooted in old property law.

Some courts have realized that certain of the old rules of

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[9] *See, e.g.*, NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 9 (1968). The extensive standards set out in the Housing Regulations provide a good guide to community expectations.

[10] 2 R. POWELL, REAL PROPERTY ¶ 221[1] at 179 (1967).

property law governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases.[11] Proceeding piecemeal has, however, led to confusion where "decisions are frequently conflicting, not because of a healthy disagreement on social policy, but because of the lingering impact of rules whose policies are long since dead."[12]

In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.[13]

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[11] *E.g., Medico-Dental Building Co.* v. *Horton & Converse*, 21 Cal.2d 411, 418, 132 P.2d 457, 462 (1942). *See also* 1 AMERICAN LAW OF PROPERTY § 3.11 at 202-205 (A. Casner ed. 1952); Note, *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952); Friedman, *The Nature of a Lease in New York*, 33 CORNELL L. Q. 165 (1947).

[12] Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L. J. 262, 263 (1964).

[13] This approach does not deny the possible importance of the fact that land is involved in a transaction. The interpretation and construction of contracts between private parties has always required courts to be sensitive and responsive to myriad different factors. We believe contract doctrines allow courts to be properly sensitive to all relevant factors in interpreting lease obligations.

We also intend no alteration of statutory or case law definitions of the term "real property" for purposes of statutes or decisions on recordation, descent, conveyancing, creditors' rights, etc. We contemplate only that contract law is to determine the rights and obligations of the parties to the lease agreement, as between themselves. The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law. *See*

III

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality.[14] In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability.[15] Thus without any special agreement a merchant will be held to warrant that his goods are fit for the ordinary purposes for which such goods are used and that they are at least of reasonably average quality. Moreover, if the supplier has been notified that goods are required for a specific purpose, he will be held to warrant that any goods sold are fit for that purpose. These implied warranties have become widely accepted and well established features of the common law, supported by the overwhelming body of case law.[16] Today most states as well as the District of Columbia [17] have codified and enacted these warranties into statute, as to the sale of goods, in the Uniform Commercial Code.

Implied warranties of quality have not been limited to cases involving sales. The consumer renting a chattel, paying for services, or buying a combination of goods and serv-

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2 M. PLANIOL, TREATISE ON THE CIVIL LAW § 1663 *et seq.* (1959); 11 LA. STAT. ANN., CIVIL CODE, Art. 2669 (1952).

[14] *See generally* 8 S. WILLISTON, CONTRACTS §§ 983-989 (3d ed. W. Jaeger 1964); W. PROSSER, TORTS § 95 (3 ed. 1964).

[15] *See* Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 RUTGERS L. REV. 493 (1962); UNIFORM COMMERCIAL CODE §§ 2-314, 2-315 (1968).

[16] *Ibid.*

[17] 28 D. C. CODE Subtitle I (1967).

ices must rely upon the skill and honesty of the supplier to at least the same extent as a purchaser of goods. Courts have not hesitated to find implied warranties of fitness and merchantability in such situations.[18] In most areas product liability law has moved far beyond "mere" implied warranties running between two parties in privity with each other.[19]

The rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate.[20] Now, however, courts have begun to hold sellers and developers of real property responsible for the quality of their product.[21] For example, builders of new homes have recently been held liable to purchasers for improper construction on the ground that the builders had breached an implied warranty of fitness.[22] In other cases

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[18] Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957). *See Cintrone* v. *Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965); 2 F. HARPER & F. JAMES, TORTS § 28.19 at 1577 n.5 and n.6 (1956).

[19] *See, e.g., Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Goldberg* v. *Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S. 2d 592, 191 N.E.2d 81 (1963). *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960); Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAWYER 501 (1964).

[20] *See Fegeas* v. *Sherill*, 218 Md. 472, 147 A.2d 223 (1958); 7 S. WILLISTON, CONTRACTS § 926 at 800-801, § 926A (3d ed. W. Jaeger 1963).

[21] *See generally* Bearman, *Caveat Emptor in Sale of Realty —Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953).

[22] *See Waggoner* v. *Midwestern Development, Inc.*, S.Dak., 154 N.W.2d 803 (1967); *Bethlahmy* v. *Bechtel*, Idaho, 415 P.2d 698 (1969); *Schipper* v. *Levitt & Sons, Inc.*, *supra* Note 7; *Carpenter* v. *Donohoe*, Colo., 388 P.2d 399 (1964); *Loraso* v.

courts have held builders of new homes liable for breach of an implied warranty that all local building regulations had been complied with.[23] And following the developments in other areas, very recent decisions [24] and commentary [25] suggest the possible extension of liability to parties other than the immediate seller for improper construction of residential real estate.

Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments. Recent decisions have offered no convincing explanation for their refusal [26]; rather they have relied without discussion upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contract.[27] However, the Supreme Courts of at least two states, in recent and well reasoned opinions, have held land-

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Custom Built Homes, Inc., La.App., 144 So.2d 459 (1962). Other cases still continue the older limitation on the vendor's liability to homes sold before construction is complete. *See, e.g., Hoye* v. *Century Builders*, Wash., 329 P.2d 474 (1958).

[23] *See Schiro* v. *W. E. Gould & Co.*, 18 Ill.2d 538, 165 N.E.2d 286 (1960); Annot., 110 A.L.R. 1048 (1937).

[24] *Connor* v. *Great Western Savings and Loan Ass'n*, 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P. 2d 609 (1968) (in bank) (Traynor, Ch.J.). Chief Justice Traynor's excellent opinion utilizes tort doctrines to extend liability beyond the immediate seller.

[25] Comment, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U. CHI. L. REV. 739 (1968).

[26] *E.g., Kearse* v. *Spaulding*, 406 Pa. 140, 176 A.2d 450 (1962); *Susskind* v. *1736 Tenants Corp.*, New York City Ct., 251 N.Y.S.2d 321 (1964); *Rubinger* v. *Del Monte*, N.Y.S.Ct., App. T., 217 N.Y.S.2d 792 (1961).

[27] The cases which recite this old rule are legion. A representative sampling is cited in 32 AM. JUR. *Landlord and Tenant* § 655 n.14 (1941).

lords to implied warranties of quality in housing leases. *Lemle* v. *Breeden*, S.Ct. Hawaii, 462 P.2d 470 (1969); *Reste Realty Corp.* v. *Cooper*, 53 N.J. 444, 251 A.2d 268 (1969). *See also Pines* v. *Perssion*, 14 Wis.2d 590, 111 N.W.2d 409 (1961). In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned[28] in favor of an implied warranty of habitability.[29] In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

IV

A. In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.

The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages.[30] Such a rule

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[28] As far as tort liability is concerned, we have previously held that the old common law rule has been changed by passage of the housing code and that the landlord has a duty to maintain reasonably safe premises. *See* Note 52 *infra*.

[29] Although the present cases involve written leases, we think there is no particular significance in this fact. The landlord's warranty is implied in oral and written leases for all types of tenancies.

[30] The rule was "settled" by 1485. 3 W. HOLDSWORTH, A

was perhaps well suited to an agrarian economy; the land was more important [31] than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself.[32] These historical facts were the basis on which the common law constructed its rule; they also provided the necessary prerequisites for its application.[33]

HISTORY OF ENGLISH LAW 122-123 (6th ed. 1934). The common law rule discussed in text originated in the even older rule prohibiting the tenant from committing waste. The writ of waste expanded as the tenant's right to possession grew stronger. Eventually, in order to protect the landowner's reversionary interest, the tenant became obligated to make repairs and liable to eviction and damages if he failed to do so. *Ibid.*

[31] The land was so central to the original common law conception of a leasehold that rent was viewed as "issuing" from the land: "[T]he governing idea is that the land is bound to pay the rent * * *. We may almost go to the length of saying that the land pays it through [the tenant's] hand." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 131 (2d ed. 1923).

[32] Many later judicial opinions have added another justification of the old common law rule. They have invoked the timeworn cry of *caveat emptor* and argued that a lessee has the opportunity to inspect the premises. On the basis of his inspection, the tenant must then take the premises "as is," according to this reasoning. As an historical matter, the opportunity to inspect was not thought important when the rule was first devised. *See* Note 30 *supra*. To the extent the no-repair rule rests on *caveat emptor*, *see* pages 15-16, *infra*.

[33] Even the old common law courts responded with a different rule for a landlord-tenant relationship which did not conform to the model of the usual agrarian lease. Much more substantial obligations were placed upon the keepers of inns (the only multiple dwelling houses known to the common law). Their guests were interested solely in shelter and could not be expected to make their own repairs. "The modern apartment

Court decisions in the late 1800's began to recognize that the factual assumptions of the common law were no longer accurate in some cases. For example, the common law, since it assumed that the land was the most important part of the leasehold, required a tenant to pay rent even if any building on the land was destroyed.[34] Faced with such a rule and the ludicrous results it produced, in 1863 the New York Court of Appeals declined to hold that an upper story tenant was obliged to continue paying rent after his apartment building burned down.[35] The court simply pointed out that the urban tenant had no interest in the land, only in the attached building.

Another line of cases created an exception to the no-repair rule for short term leases of furnished dwellings.[36] The Massachusetts Supreme Judicial Court, a court not known for its willingness to depart from the common law, supported this exception, pointing out:

> "* * * [A] different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in refer-

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dweller more closely resembles the guest in an inn than he resembles an agrarian tenant, but the law has not generally recognized the similarity." J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE 6-7 (Tent. Draft 1969).

[34] *Paradine* v. *Jane*, Aleyn 26, 82 Eng.Rep. 897 (K.B. 1947); 1 AMERICAN LAW OF PROPERTY, *supra* Note 11, § 3.103.

[35] *Graves* v. *Berdan*, 26 N.Y. 498 (1863).

[36] 1 AMERICAN LAW OF PROPERTY, *supra* Note 11, § 3.45 at 267-268, and cases cited therein.

> ence to a well-understood purpose of the hirer to use it as a habitation. * * * It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. * * * "[37]

These as well as other similar cases [38] demonstrate that some courts began some time ago to question the common law's assumptions that the land was the most important feature of a leasehold and that the tenant could feasibly make any necessary repairs himself. Where those assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair.

It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today's urban [39] tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's

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[37] *Ingalls* v. *Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892).

[38] The cases developing the doctrines of "quiet enjoyment" and "constructive eviction" are the most important. *See* 2 R. POWELL, *supra* Note 10, ¶ 225[3]. *See also Gladden* v. *Walker & Dunlop*, 83 U.S.App.D.C. 224, 168 F.2d 321 (1948) (landlord has duty to maintain portions of apartment "under his control" including plumbing, heating and electrical systems); *J. D. Young Corp.* v. *McClintic*, Tex.Civ.App., 26 S.W.2d 460 (1930) (implied covenant of fitness in lease of building under construction); *Steefel* v. *Rothschild*, 179 N.Y. 273, 72 N.E. 112 (1904) (duty to disclose latent defects).

[39] In 1968 more than two thirds of America's people lived in the 228 largest metropolitan areas. Only 5.2% lived on farms. THE WORLD ALMANAC 1970 at 251 (L. Long ed.). More than 98% of all housing starts in 1968 were non-farm. *Id.* at 313.

model of the lessee.[40] Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.

Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases referred to above.[41] In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose." *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, ——, 161 A.2d 69, 78 (1960).[42]

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[40] *See* J. LEVI *et al.*, *supra* Note 33, at 6.

[41] *See* Part III, *supra*.

[42] Nor should the average tenant be thought capable of "in-

Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented. We point out that in the present cases there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases.[43] Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term. It is precisely such expectations that the law now recognizes as deserving of formal, legal protection.

Even beyond the rationale of traditional products liability law, the relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenants' legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented.[44] Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class

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specting" plaster, floorboards, roofing, kitchen appliances, etc. To the extent, however, that some defects *are* obvious, the law must take note of the present housing shortage. Tenants may have no real alternative but to accept such housing with the expectation that the landlord will make necessary repairs. Where this is so, *caveat emptor* must of necessity be rejected.

[43] In *Brown* v. *Southall Realty Co.*, 237 A.2d 834 (1968), the District of Columbia Court of Appeals held that unsafe and unsanitary conditions existing at the beginning of the tenancy and known to the landlord rendered any lease of those premises illegal and void.

[44] *See Edwards* v. *Habib*, 130 U.S.App.D.C. 126, 140, 397 F.2d 687, 701 (1968); 2 R. POWELL, *supra* Note 10, ¶ 221 [1] at 183; PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 96 (1968).

discrimination [45] and standardized form leases,[46] mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage [47] of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.[48]

Thus we are led by our inspection of the relevant legal principles and precedents to the conclusion that the old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds. Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts [49] for urban dwellings.

B. We believe, in any event, that the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers. The housing code—formally designated the Housing Regulations of the District of Columbia—was established and authorized by

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[45] PRESIDENT'S COMMITTEE, *supra* Note 44, at 96; NATIONAL COMMISSION, *supra* Note 9, at 18-19; G. STERNLIEB, THE TENEMENT LANDLORD 71 (1966).

[46] R. POWELL, *supra* Note 10, ¶ 221[1] at 183 n.13.

[47] *See generally* PRESIDENT'S COMMITTEE, *supra* Note 44.

[48] A. SCHORR, SLUMS AND INSECURITY (1963); J. LEVI *et al.*, *supra* Note 33, at 7-8.

[49] We need not consider the provisions of the written lease governing repairs since this implied warranty of the landlord could not be excluded. *See Henningsen* v. *Bloomfield Motors, Inc.*, *supra* Note 19; *Kay* v. *Cain*, 81 U.S.App.D.C. 24, 25, 154 F.2d 305, 306 (1946). *See also* Note 58, *infra*.

the Commissioners of the District of Columbia on August 11, 1955.[50] Since that time, the code has been updated by numerous orders of the Commissioners. The 75 pages of the Regulations provide a comprehensive regulatory scheme setting forth in some detail: (a) the standards which housing in the District of Columbia must meet;[51] (b) which party, the lessor or the lessee, must meet each standard; and (c) a system of inspections, notifications and criminal penalties. The Regulations themselves are silent on the question of private remedies.

Two previous decisions of this court, however, have held that the Housing Regulations create legal rights and duties enforceable in tort by private parties. In *Whetzel* v. *Jess Fisher Management Co.*, 108 U.S. App.D.C. 385, 282 F.2d 943 (1960), we followed the leading case of *Altz* v. *Lieberson*, 233 N.Y. 16, 134 N.E. 703 (1922), in holding (1) that the housing code altered the common law rule and imposed a duty to repair upon the landlord, and (2) that a right of action accrued to a tenant injured by the landlord's breach of this duty. As Judge Cardozo wrote in *Lieberson*:

> "• • • We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect. • • • "

134 N.E. at 704. Recently, in *Kanelos* v. *Kettler*, 132 U.S. App.D.C. 133, 135, 406 F.2d 951, 953 (1968), we reaffirmed our position in *Whetzel*, holding that "the Housing Regula-

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[50] 2 D. C. REGISTER 47 (1955).

[51] These include standards for nursing homes and other similar institutions. The full scheme of the Regulations is set out in *Whetzel* v. *Fisher Management Co.*, *supra* Note 8.

tions did impose maintenance obligations upon appellee [landlord] which he was not free to ignore." [52]

The District of Columbia Court of Appeals gave further effect to the Housing Regulations in *Brown* v. *Southall Realty Co.*, 237 A.2d 834 (1968). There the landlord knew at the time the lease was signed that housing code violations existed which rendered the apartment "unsafe and unsanitary." Viewing the lease as a contract, the District of Columbia Court of Appeals held that the premises were let in violation of Sections 2304 [53] and 2501 [54] of the Regulations and that the lease, therefore, was void as an illegal contract. In the light of *Brown*, it is clear not only that the housing code creates privately enforceable duties as held in *Whetzel*, but that the basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term. The *Brown* court relied particularly upon Section 2501 of the Regulations which provides:

> "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of this Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

By its terms, this section applies to maintenance and re-

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[52] *Kanelos* and *Whetzel* have effectively overruled, on the basis of the enactment of the housing code, *Bowles* v. *Mahoney*, 91 U.S.App.D.C. 155, 202 F.2d 320 (1952) (two to one decision, Judge Bazelon dissenting).

[53] "No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin."

[54] *See infra.*

pair during the lease term. Under the *Brown* holding, serious failure to comply with this section before the lease term begins renders the contract void. We think it untenable to find that this section has no effect on the contract after it has been signed. To the contrary, by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.

This principle of implied warranty is well established. Courts often imply relevant law into contracts to provide a remedy for any damage caused by one party's illegal conduct.[55] In a case closely analogous to the present ones, the Illinois Supreme Court held that a builder who constructed a house in violation of the Chicago building code had breached his contract with the buyer:

> "* * * [T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it. * * *
>
> "The rationale for this rule is that the parties to the contract would have expressed that which the law implies 'had they not supposed that it was unnecessary to speak of it because the law provided for it.' * * * Consequently, the courts, in construing the existing law as part of the express contract, are not reading into the contract provisions different from those expressed and intended by the parties, as defendants contend, but are merely construing the contract in accordance with the intent of the parties." [56]

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[55] *See* cases cited in Annot., 110 A.L.R. 1048 (1937).

[56] *Schiro* v. *W. E. Gould & Co.*, *supra* Note 23, 18 Ill.2d at ——, 165 N.E.2d at 290. As a general proposition, it is undoubtedly true that parties to a contract intend that applicable law will be complied with by both sides. We recognize, however, that reading statutory provisions into private contracts may have little factual support in the intentions of the particular parties now before us. But, for reasons of public

We follow the Illinois court in holding that the housing code must be read into housing contracts—a holding also required by the purposes and the structure of the code itself.[57] The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor.[58] Criminal penalties are provided if these duties are ignored. This regulatory structure was established by the Commissioners because, in their judgment, the grave conditions in the housing market required serious action. Yet official enforcement of the hous-

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policy, warranties are often implied into contracts by operation of law in order to meet generally prevailing standards of honesty and fair dealing. When the public policy has been enacted into law like the housing code, that policy will usually have deep roots in the expectations and intentions of most people. *See* Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376, 383-385 (1920).

[57] "The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live." *Edwards* v. *Habib*, *supra* Note 44, 130 U.S.App.D.C. at 139, 397 F.2d at 700.

[58] Any private agreement to shift the duties would be illegal and unenforceable. The precedents dealing with industrial safety statutes are directly in point:

> "* * * [T]he only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. * * *"

Narramore v. *Cleveland, C., C. & St. L. Ry. Co.*, 6 Cir., 96 F. 298, 302 (1899). *See* W. PROSSER, TORTS § 67 at 468-469 (3d ed. 1964) and cases cited therein.

ing code has been far from uniformly effective.[59] Innumerable studies have documented the desperate condition of rental housing in the District of Columbia and in the nation. In view of these circumstances, we think the conclusion reached by the Supreme Court of Wisconsin as to the effect of a housing code on the old common law rule cannot be avoided:

> "* * * [T]he legislature has made a policy judgment —that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. * * *"[60]

We therefore hold that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.

V

In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles,[61] however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the

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[59] *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

[60] *Pines* v. *Perssion*, 14 Wis.2d 590, ——, 111 N.W.2d 409, 412-413 (1961). *Accord*, *Buckner* v. *Azulai*, App.Dept.,Super. Ct., 59 Cal.Rptr. 806 (1967).

[61] In extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability.

housing code violations alleged as breach of the landlord's warranty.[62]

At trial, the finder of fact must make two findings: (1) whether the alleged violations[63] existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's total breach, then the action for possession on the ground of nonpayment must fail.[64]

The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid back rent is indeed owed to the landlord.[65] In these circumstances,

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[62] To be relevant, of course, the violations must affect the tenant's apartment or common areas which the tenant uses. Moreover, the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action. However, violations resulting from inadequate repairs or materials which disintegrate under normal use would not be assignable to the tenant. Also we agree with the District of Columbia Court of Appeals that the tenant's private rights do not depend on official inspection or official finding of violation by the city government. *Diamond Housing Corp.* v. *Robinson*, 257 A.2d 492, 494 (1969).

[63] The jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent.

[64] As soon as the landlord made the necessary repairs rent would again become due. Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground.

[65] In *George Y. Worthington & Son Management Corp* v.

no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due.[66] If the tenant refuses to pay the partial amount, a judgment for possession may then be entered.

The judgment of the District of Columbia Court of Appeals is reversed and the cases are remanded for further proceedings consistent with this opinion.[67]

So ordered.

Circuit Judge Robb concurs in the result and in Parts IV-B and V of the opinion.

Levy, 204 A.2d 334, 336 (1964), the District of Columbia Court of Appeals approved a similar procedure:

> "In actions for possession of real property by reason of default in rent, where no money judgment for the back rent is sought, it is nevertheless proper practice for the trial court to specifically find the amount of rent in arrears. * * *"

[66] *Compare Molyneaux* v. *Town House, Inc.*, D.C.C.A., 195 A.2d 744 (1963). A jury finding that the landlord had failed to live up to all of his obligations would operate as a conclusive finding that the tenant was entitled to equitable relief under *Molyneaux*.

[67] Appellants in the present cases offered to pay rent into the registry of the court during the present action. We think this is an excellent protective procedure. If the tenant defends against an action for possession on the basis of breach of the landlord's warranty of habitability, the trial court may require the tenant to make future rent payments into the registry of the court as they become due; such a procedure would be appropriate only while the tenant remains in possession. The escrowed money will, however, represent rent for the period between the time the landlord files suit and the time the case comes to trial. In the normal course of litigation, the only fac-

tual question at trial would be the condition of the apartment during the time the landlord alleged rent was due and not paid.

As a general rule, the escrowed money should be apportioned between the landlord and the tenant after trial on the basis of the finding of rent actually due for the period at issue in the suit. To insure fair apportionment, however, we think either party should be permitted to amend its complaint or answer at any time before trial, to allege a change in the condition of the apartment. In this event, the finder of fact should make a separate finding as to the condition of the apartment at the time at which the amendment was filed. This new finding will have no effect upon the original action; it will only affect the distribution of the escrowed rent paid after the filing of the amendment.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 4119

RUDOLPH SAUNDERS, APPELLANT,

v.

FIRST NATIONAL REALTY CORPORATION, APPELLEE.

No. 4120

ETHEL JAVINS, APPELLANT,

v.

FIRST NATIONAL REALTY CORPORATION, APPELLEE.

No. 4121

GLADYS GRANT, APPELLANT,

v.

FIRST NATIONAL REALTY CORPORATION, APPELLEE.

No. 4122

STANLEY GROSS, SR., APPELLANT,

v.

FIRST NATIONAL REALTY CORPORATION, APPELLEE.

Appeals from the District of Columbia
Court of General Sessions

(Argued March 11, 1968 Decided September 23, 1968)

Edmund E. Fleming for appellants.

Herman Miller for appellee.

Before HOOD, Chief Judge, and MYERS and KELLY, Associate Judges.

HOOD, *Chief Judge*: Appellants were tenants in a large apartment complex known as Clifton Terrace. Their land-

lord, the appellee, filed separate actions against them for possession because of nonpayment of rent. Represented by the same counsel, appellants demanded trial by jury and presented identical defenses. At trial appellants offered to prove:

> That there are approximately 1500 violations of the Housing Regulations of the District of Columbia in the building at Clifton Terrace, where Defendant resides some affecting the premises of this Defendant directly, others indirectly, and all tending to establish a course of conduct of violation of the Housing Regulations to the damage of Defendants and of others similarly situated.

This offer of proof was rejected by the trial court, and counsel for appellants then advised the court that without such evidence there were no issues to be tried. Accordingly the court entered judgment for possession in each of the cases.

We first consider appellee's claim that these cases are moot. This claim is based on appellee's assertion (not disputed by appellants) that three of appellants have voluntarily moved from the premises and the fourth has voluntarily paid his rent and continues to pay rent to the new owner of the apartment house, and that appellee, having sold the apartment house, has no claim to possession of the four apartments. The argument is that since the actions sought possession only and possession is no longer in dispute, the appeals are moot.

Where legal issues raised on appeal would be res judicata between the parties in a subsequent proceeding, an appeal should not be dismissed even though the main controversy has become moot.[1] In *Brown v. Southall Realty Co.*, D.C. App., 237 A.2d 834 (1968), we recognized that rights regarding the validity of a lease and the amount of rent due under it would be irrevocably established if the judgment in a possessory action for nonpayment of rent was allowed to stand. Since appellants here contended that no rents were due because of appellee's violations of the Housing

[1] 5 Am.Jur.2d, Appeal & Error, § 766.

Regulations, we believe a decision on the merits of the appeal is necessary.

Two arguments are advanced by appellants. The first, made at oral argument, is that under our ruling in *Brown v. Southall Realty Co., supra*, if violations of the Housing Regulations occur during the tenancy (appellants conceded they could not prove the existence of any of the alleged violations at the commencement of the tenancies) and the landlord failed to correct them, the lease becomes illegal and void. Our holding in *Southall* was that where the owner of dwelling property, knowing that Housing Code violations exist on the property which render it unsafe and unsanitary, executes a lease for the property, such lease is void and cannot be enforced. We did not hold and we now refuse to hold that violations occurring after the tenancy is created void the lease.

Appellants' main argument, advanced in their brief, is that the Housing Regulations have abrogated the common law relation between landlord and tenant and have created a contractual duty on the landlord to comply with the Regulations. From this premise appellants argue that if the landlord fails to comply, the tenant, in an action for possession for nonpayment of rent, may use such failure as "an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim" under Rule 4(c) of the Landlord and Tenant Branch of the trial court. This rule limits the landlord's basis for recovery of possession where the consideration for the rent has failed wholly or in part because of the landlord's breach of an express or implied lease obligation, and modifies the common law rule of independent covenants in the lease.[2] Therefore, if appellee had a contractual duty to maintain the premises in compliance with the Housing Regulations, appellants may properly defend by way of set-off against the rent owed.

The long established rule in this jurisdiction, following the common law, is that, in the absence of statute or express covenant in the lease, a landlord does not impliedly covenant or warrant that the leased premises are in habitable condition and the landlord is not obligated to make ordinary

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[2] *See* Seidenberg v. Burka, D.C.Mun.App., 106 A.2d 490 (1954); Mitchell v. David, D.C.Mun.App., 51 A.2d 375 (1947).

repairs to the leased premises in the exclusive control of the tenant. The question here presented is whether the Housing Regulations impose upon the landlord a contractual duty to maintain the premises in compliance with the Regulations.

In both *Edwards v. Habib*, —— U.S.App.D.C. ——, —— F.2d —— (decided May 17, 1968) and *Whetzel v. Jess Fisher Management Co.*, 108 U.S.App.D.C. 385, 282 F.2d 943 (1960), the court implied that the Housing Regulations have the force and effect of statute, and for present purposes we will so treat the Regulations. Assuming, but not deciding, that in enacting the Regulations the Commissioners of the District of Columbia had the power to impose upon landlords a contractual duty, enforceable by tenants, to comply with the Regulations, the question is did they intend to do so and bring about a drastic change in the landlord and tenant law of this jurisdiction.

"No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Railroad*, 101 U. S. 557, 565 (1880), quoted with approval in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U. S. 297, 304-05 (1959).[3] We find nothing in the Housing Regulations expressly or necessarily implying that a contractual duty is imposed on the landlords to comply with the Regulations. There are express provisions for punishment by fine or imprisonment,[4] or suspension or revocation of a landlord's housing business license,[5] as sanctions for violation of the Regulations. In some jurisdictions where similar penalties have been imposed, the enacting body has gone farther and provided a variety of tenant remedies;[6] but we have no such provision here. Where, as here, the regulations or statute merely impose a penalty for failure to repair and maintain the leased premises in a habitable condition the courts have refused to enlarge the scope of the landlord-tenant

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[3] *See also* 82 C.J.S. Statutes § 363.

[4] Housing Regulations §§ 2104, 3303.

[5] Housing Regulations § 3102.3.

[6] See for example, New York Real Property Actions Law § 769 et seq.; Cal. Civ. Code § 1942; N. Dak. Century Code § 47-16-13.

relation by subjecting the landlord to implied contractual obligations.[7]

Had the Commissioners intended that the Regulations impose a contractual duty on landlords enforceable by tenants (again we assume but do not decide that the Commissioners had the power to do so), we think they would have made such intention clear and not left it to conjecture. We see some very practical reasons why the Commissioners may have felt that enforcement of the Regulations should be left to the trained personnel authorized to administer the Regulations. The Regulations are broad in scope and in many instances are expressed in general language, leaving room for the exercise of judgment by those enforcing the Regulations. For example, we find scattered throughout the Regulations expressions such as "good repair", "good condition", "clean", "kept painted", "properly connected", "normal occupancy", "normal demands", "wide cracks", "adequate", etc. These and other like expressions in the Regulations do not state exact standards but leave considerable margin to the judgment of the enforcing authorities.

We cannot believe that the Commissioners intended that the single violation of any of the Regulations for any length of time would give ground for defending against payment of rent in whole or in part. And if a minor infraction of the Regulations for a brief period gives rise to no defense to a claim for rent, neither will a more serious violation for a greater length of time, because the Regulations furnish no standard for differentiating between consequential and inconsequential violations.

Appellants argue that *Whetzel v. Jess Fisher Management Co.*, 108 U.S.App.D.C. 385, 282 F.2d 943 (1960), supports their contention. We do not so read that case. We understand it to hold that where a landlord negligently fails to comply with the Housing Regulations and as a result the tenant is injured, the tenant may sue the landlord in tort. This was simply an application of the rule that a private action for negligence may be based upon

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[7] Rubinger v. Del Monte, 217 N.Y.S.2d 792 (N.Y.Sup.Ct., 1961); Davar Holdings, Inc. v. Cohen, 255 App.Div. 445, 7 N.Y.S.2d 911 (1938), *aff'd*, 280 N.Y. 828, 21 N.E.2d 882; Metcalf v. Chiprin, 217 Cal.App.2d 305, 31 Cal.Rptr 571 (1963). *See also*, Peters v. Kelly, 98 N.J.Super. 441, 237 A.2d 635 (1968).

violation of a penal statute where the injured party is within the class of persons the statute intended to protect and the injury was of the type the statute intended to prevent.[8] *Whetzel* did not hold that the Housing Regulations enlarge the contractual duties of a landlord.

Our conclusion is that under the established law of this jurisdiction the landlord's violations of the Housing Regulations is not a defense to his action for possession based on nonpayment of rent.

Affirmed.

[8] Wyandotte Transportation Co. v. United States, 389 U. S. 191, 202 (1967).